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No. 90-1826

In the Supreme Court of the United States

OCTOBER TERM, 1991

CALVERT H. FLETCHER, AKA "HUGH FLETCHER," AND N. KARENE FLETCHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
KAREN QUESNEL
Attorneys

Department of Justice
Washington, D.C. 20044
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the prosecution was barred by the statute of limitations.

2. Whether the district court properly gave the jury a "conscious avoidance" instruction.

3. Whether the district court properly instructed the jury that it could consider petitioners' educational and career backgrounds in determining intent.

4. Whether the district court erred in determining that expert testimony proffered by petitioner should be excluded as irrelevant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 928 F.2d 495.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1991. The petition for a writ of certiorari was filed on May 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioners Calvert H.

Fletcher and N. Karene Fletcher were convicted on one count of conspiracy to defraud the United States by impairing and impeding the lawful governmental functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371. Petitioner Calvert H. Fletcher was sentenced to 22 months' imprisonment and a $10,000 fine. Petitioner N. Karene Fletcher was sentenced to two years' imprisonment, with all but two months suspended, and a $10,000 fine. The court of appeals affirmed.

1. The evidence at trial showed that Robert G. Morrison approached petitioner Calvert Fletcher with a plan to manufacture and market a commemorative rifle. Mr. Fletcher agreed to convince his employer, Winchester Firearms, to manufacture the rifle. Morrison and Fletcher agreed that Fletcher would receive a 50% interest in the anticipated profits of the venture. To conceal his conflict of interest from Winchester, Fletcher arranged to have his interest in the venture held in the names of Gene Quirini and Fletcher's future wife, petitioner N. Karene Fletcher. Pet. App. 3-5.

Morrison, Quirini, and Mrs. Fletcher formed a partnership to market the rifles, which operated under the name Commemorative Products, Ltd. (CPL). The conspirators agreed to record the profits of CPL on the books of Morrison's Security Wholesale, Inc. (MSW), a corporation controlled by Morrison, apparently because the profits could be offset against carry-forward losses held by MSW. The conspirators also agreed to minimize CPL's apparent taxable profits by distributing numbered lithographic prints with the rifles and artificially inflating the cost of the prints. Finally, the conspirators agreed to transfer a portion of the profits to a Bahamian bank account controlled by Mr. Fletcher and held in the name of a shell corporation, ostensibly to cover the costs of printing the lithographs. Pet. App. 5-6.

The scheme eventually fell apart because of infighting among the conspirators. Quirini, on behalf of Mr. Fletcher and unbeknownst to Morrison, used $253,000 in advance payments from gun customers to pay for expenses of businesses unrelated to the rifle venture. Quirini also opened an account, using a false taxpayer identification number, to which only he and Mr. Fletcher had access and into which he deposited some of the profits generated by CPL. Morrison soon discovered the misuse of the CPL funds, however, because CPL fell behind in its payments to Winchester. After Morrison confronted Mr. Fletcher with the irregularities, Fletcher agreed that he would pay Morrison his proper share of the profits. Fletcher made that payment on April 5, 1983, by causing Quirini and Mrs. Fletcher to execute a $50,000 promissory note to Morrison, and by causing Mrs. Fletcher to execute a stock escrow agreement that would cause certain stock to be delivered to Morrison on January 1, 1984. On that same day, Morrison, Quirini, and Mrs. Fletcher dissolved CPL. Petitioners were indicted and then convicted after a trial at which Morrison and Quirini testified for the government. Pet. App. 7-9.

2. The court of appeals affirmed. Pet. App. 1-35. The court first rejected petitioners' argument that the government had failed to show that one of the conspirators had committed an overt act within the six-year period preceding the indictment, as required by the applicable statute of limitations. *Id.* at 10-20. Because the April 5, 1983, promissory note to Morrison constituted a payoff of profits to Morrison, the court concluded that execution of the note was an overt act in furtherance of the conspiracy. Because that act occurred within the six-year limitations period, the court rejected petitioners' statute of limitations argument. *Id.* at 10-11, 16-19.

The court next rejected petitioners' challenges to certain jury instructions. The court held that the trial judge

properly had instructed the jurors that they could consider petitioners' educational background in determining whether they had the requisite intent, because "the trier of fact may properly consider the general educational background and expertise of the defendant as bearing on the defendant's ability to form the requisite wilful intent." Pet. App. 24; see *id.* at 20-26. The court also held that the trial court properly had given an instruction that petitioners could be found to have knowledge of the unlawful objectives of the conspiracy if they "acted with deliberate disregard of a high probability that the conspiracy had such an objective." *Id.* at 21. The court rejected petitioners' claim that such an instruction should be given only in cases in which the defendants "contest some specific aspect of knowledge necessary for conviction," noting that it was clear from the record that petitioners had contested the government's claim that they knew the conspiracy was unlawful. *Id.* at 27. Because of petitioners' acknowledged participation in the conspiracy, the court concluded that the government was entitled to argue that petitioners either knew that the conspiracy was illegal or must have consciously avoided obtaining that knowledge. See *id.* at 26-31.

Finally, the court of appeals rejected petitioners' claim that the trial court erred by excluding expert testimony about the advantages of using foreign trusts and foreign corporations. The court agreed with the trial court that the evidence properly was excludable for lack of relevance because there was no evidence that the conspiracy involved the use of either foreign trusts or foreign corporations. See Pet. App. 31-35.

ARGUMENT

1. Petitioners first argue (Pet. 19-26) that the court of appeals erred in holding that execution of the promissory

note on April 5, 1983, furthered the conspiracy alleged in the indictment and that the prosecution therefore was not time-barred. The limitations period for a conspiracy to defraud the United States in violation of 18 U.S.C. 371 is six years. 26 U.S.C. 6531(1). The grand jury returned the indictment on April 4, 1989, Pet. App. 10, so the government was required to prove that the conspiracy was still in existence on April 4, 1983, and that "at least one overt act in furtherance of the conspiracy was performed after that date," *Grunewald* v. *United States*, 353 U.S. 391, 396 (1957). As Justice Harlan explained for this Court in *Grunewald*, "the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *Id.* at 397.

The court of appeals correctly determined that the note was executed to secure for Morrison his share of the rifle profits. As the court pointed out (Pet. App. 17), Morrison testified that the note was to "make up for some of the funds that had been missing from the Bahamian account," funds that represented profits of the conspiracy that Quirini and the Fletchers had misappropriated. On the basis of that determination (which petitioners do not challenge, see Pet. 19-26), the court of appeals had no difficulty in determining that the execution of the note was well within the scope of the conspirators' agreement and "furthered one of [the conspiracy's] chief goals," because "the conspiracy contemplated a division of profits among the co-conspirators." Pet. App. 17; see *United States* v. *Nazzaro*, 889 F.2d 1158, 1162 (1st Cir. 1989); *United States* v. *Doherty*, 867 F.2d 47, 61-62 (1st Cir.), cert. denied, 492 U.S. 918 (1989); *United States* v. *Dynalectric Co.*, 859 F.2d 1559, 1568-1569 (11th Cir. 1988) (payments were important objectives of the con-

spiracy, not "hush money" paid to conceal crime), cert. denied, 490 U.S. 1006 (1989); *United States* v. *Potamitis*, 739 F.2d 784, 788 (2d Cir.) ("where a general objective of the conspirators is money, the conspiracy does not end, of necessity, before the spoils are divided among the miscreants") (quoting *United States* v. *Knuckles*, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978)), cert. denied, 469 U.S. 918, 934 (1984).

Petitioners do not dispute that the pursuit of money was a goal of their conspiracy. Rather, they claim that a monetary goal does not make execution of the promissory note an overt act in furtherance of the conspiracy, because the indictment "nowhere charges that the conspirators' making money was an objective of the conspiracy." Pet. 22. In their view, the court of appeals' decision thus resulted in "[c]onviction upon a charge not made," Pet. 25 (quoting *De Jonge* v. *Oregon*, 299 U.S. 353, 362 (1937)), because "[p]etitioners purely and simply were never called upon to answer any allegation that the distribution of money to the alleged conspirators was an objective of the alleged conspiracy," Pet. 22-23. Whatever the merits of petitioners' novel contention that an indictment charging conspiracy to defraud the IRS explicitly must state that monetary profit is one of the goals of the conspiracy, the contention does not even apply to the facts of this case: the indictment clearly informed petitioners that the government believed execution of the promissory note was an overt act in furtherance of the conspiracy, Pet. App. 53-54, and the indictment just as clearly advised petitioners that one of the objectives of the charged conspiracy was to "divert partnership profits to their own use," *id.* at 42-43.[1]

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[1] Petitioners are incorrect in suggesting (Pet. 23-24) that the decision below conflicts with the Ninth Circuit's opinion in *United States* v. *Walker*, 653 F.2d 1343 (1981), cert. denied, 455 U.S. 908 (1982).

2. Petitioners also contend (Pet. 27-35) that the court of appeals erred in approving the "conscious avoidance" or "deliberate ignorance" instruction given at trial. It is well settled that a conscious avoidance instruction is generally appropriate if a defendant claims to lack knowledge and the proof at trial supports an inference of deliberate ignorance. See, *e.g.*, *United States* v. *Kelm*, 827 F.2d 1319, 1323-1324 (9th Cir. 1987); *United States* v. *Lanza*, 790 F.2d 1015, 1022 (2d Cir.), cert. denied, 479 U.S. 861 (1986). As the court of appeals explained, petitioners contested their knowledge of illegality: they consistently "denied the government's allegation that the goal of the undertaking was to defraud the IRS." Pet. App. 28. Similarly, an adequate "factual predicate for the conscious avoidance charge existed in the ample evidence from which the jury could infer that defendants consciously avoided knowing the conspiracy's

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In *Walker*, the defendant was convicted of conspiring to defraud the United States by bid-rigging a timber sale by the United States Forest Service. There, as here, the court of appeals rejected a contention that the conspirators' division of the profits of the fraudulent scheme did not constitute action in furtherance of the conspiracy to defraud. 653 F.2d at 1346-1350.

Relying on *Bridges* v. *United States*, 346 U.S. 209 (1953), petitioners suggest (Pet. 26 n.10) that the government acted improperly in charging petitioners with conspiracy to defraud the IRS "where the real gravamen of the conduct alleged in the indictment is conspiracy to commit the substantive offense of [tax evasion], a charge which would clearly have been time-barred." But *Bridges* is totally inapposite here. As this Court explained in rejecting a similar claim in *Dennis* v. *United States*, 384 U.S. 855 (1966), *Bridges* "did not turn upon construction of § 371," but upon "whether a prosecution, otherwise time-barred, could be revived by reference to the Wartime Suspension of Limitations Act." 384 U.S. at 863 & n.8. More fundamentally, the fact that the conduct charged in the indictment might have violated one or more criminal statutes not covered by the indictment has no bearing on the merits of this prosecution under Section 371.

fraudulent purpose." Pet. App. 29; see *id.* at 30 (summarizing the evidence). Petitioners have suggested no reason why this Court should reconsider the court of appeals' evaluation of this evidence. Given the strong evidence that petitioners had clear notice that the conspiracy was aimed at hiding information from the IRS, they could have been unaware of the unlawful object of the conspiracy only if they had closed their eyes to it. Thus, the instruction was proper.

Petitioners raise two principal arguments against the ruling of the court of appeals on this point. First, they argue (Pet. 28 n.12) that the evidentiary predicate for the instruction was inadequate because there was no evidence that petitioners avoided learning about the tax consequences of any of their transactions. This contention is beside the point, because the indictment did not charge that the conspiracy unlawfully violated substantive tax laws. The illegality of the conspiracy, rather, was in the use of deceit to impede the functions of the IRS. As to this point, the court of appeals carefully summarized the substantial evidence that petitioners either knew the conspiracy was unlawful or consciously avoided gaining knowledge of its illegality. See Pet. App. 30.

Second, petitioners contend that the decision of the court of appeals conflicts with decisions of the Eighth, Ninth, and Tenth Circuits, which, according to petitioners, have held that it is error to give a conscious avoidance instruction where the evidence points to either direct knowledge or a lack of guilty knowledge. Pet. 32-35 (citing *United States* v. *Alvarado*, 838 F.2d 311, 314 (9th Cir.), cert. denied, 487 U.S. 1222, 488 U.S. 838 (1988); *United States* v. *Manriquez Arbizo*, 833 F.2d 244, 248-249 (10th Cir. 1987); *United States* v. *Kelm*, 827 F.2d 1319, 1323-1324 (9th Cir. 1987); *United States* v. *White*, 794 F.2d 367, 371 (8th Cir. 1986)). This contention is meritless. The cited cases stand for the

proposition that a conscious avoidance instruction is improper if the evidence points *only* to direct knowledge or lack of knowledge, as opposed to avoidance of knowledge. See, *e.g.*, *United States* v. *Perez-Padilla*, 846 F.2d 1182, 1183 (9th Cir. 1988) (explaining that the rule petitioners draw from *Alvarado* and *Kelm* does not apply "if there is evidence of both actual knowledge and of deliberate ignorance"); *Manriquez Arbizo*, 833 F.2d at 248-249 (explaining that the instruction is inappropriate only if "the evidence against the defendant points *solely* to direct knowledge" (emphasis added)); *United States* v. *White*, 794 F.2d at 371; *United States* v. *Glick*, 710 F.2d 639, 642 (10th Cir. 1983) (no error in giving deliberate ignorance instruction where evidence supported finding of either actual knowledge or deliberate avoidance of positive knowledge), cert. denied, 465 U.S. 1005 (1984). As discussed above, the court of appeals concluded that in this case there was "ample evidence from which the jury could infer that defendants consciously avoided knowing the conspiracy's fraudulent purpose." Pet. App. 29. Accordingly, there is every reason to believe that this case would have been decided the same way by any court of appeals.[2]

3. Petitioners also assert (Pet. 35-38) that the court of appeals erred in approving the trial court's instruction that the jury could consider petitioners' educational and career backgrounds in determining whether they acted with specific

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[2] Petitioners erroneously suggest (Pet. 32-33) that this alleged conflict was noted by the Second Circuit in *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1542 n.5 (1989), cert. denied, 110 S. Ct. 1140 (1990). That case suggests only that the Ninth Circuit may be slightly more restrictive than the Second Circuit in evaluating whether the facts of a particular case are sufficient to support the inference of conscious avoidance. The only case it cites on which petitioners rely is *United States* v. *Alvarado*, and its citation does not even discuss the passage on which petitioners rely. See 884 F.2d at 1542 n.5.

intent. That argument is without merit. The government often relies on circumstantial evidence to establish that defendants possessed the requisite intent for an offense. See, *e.g.*, *United States* v. *Candoli*, 870 F.2d 496, 511 (9th Cir. 1989); *United States* v. *Ashfield*, 735 F.2d 101, 105 (3d Cir.), cert. denied, 469 U.S. 858 (1984); *United States* v. *Puerto*, 730 F.2d 627, 630 (11th Cir.), cert. denied, 469 U.S. 847 (1984); see also *Holland* v. *United States*, 348 U.S. 121, 140 (1954). And courts have recognized that a defendant's education and experience are relevant factors in determining whether he was able to form the specific intent for an offense. *United States* v. *Rischard*, 471 F.2d 105, 108 (8th Cir. 1973) (trier of fact in tax evasion case "could have properly considered the general educational background and experience of the appellant as bearing on the appellant's ability to form the requisite wilful intent"); *United States* v. *Ashfield*, 735 F.2d at 107; *United States* v. *Jacobs*, 475 F.2d 270, 280 (2d Cir.), cert. denied, 414 U.S. 821 (1973); see also *Cheek* v. *United States*, 111 S. Ct. 604, 615 (1991) (Blackmun, J., dissenting). The evidence in this case established that Mr. Fletcher was an attorney and a business executive (C.A. App. 39, 90-91, 211-213, 219, 241) and that Mrs. Fletcher was a bookkeeper (C.A. App. 91, 215). Contrary to petitioners' contention (Pet. 36-37), their backgrounds were probative of intent: experience in business and bookkeeping tends to support an inference that petitioners were capable of recognizing and understanding the import of their conduct. Thus, the instruction at issue merely informed the jury of a factor it properly could consider in determining whether petitioners had the specific intent required for conviction.

Petitioners are incorrect in their suggestion (Pet. 37) that the court's instruction somehow lowered the burden of proof so that the jury convicted petitioners on the basis of negligent, rather than intentional, actions. The court of

appeals observed that "the jury was properly warned that reckless ignorance of the tax law does not constitute willful intent to violate the law, that willful participation in a conspiracy requires 'specific intent to do something the law forbids' and that the Fletchers were not guilty if they 'actually believed that the agreement and understandings would not be used to defraud the Internal Revenue Service.'" Pet. App. 26.[3]

4. Finally, petitioners claim (Pet. 39-44) that the district court erred in refusing to allow petitioners to introduce expert testimony regarding the tax advantages of foreign trusts and foreign corporations. As the court of appeals explained, the decision of the district court was unquestionably correct, because at the time petitioners attempted to introduce the testimony, "there was no testimony as to any foreign corporations and Quirini, Morrison and Mrs. Fletcher had testified that no money had been placed in trust accounts." Pet. App. 33.[4]

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[3] Petitioners' reliance on *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943), see Pet. 38, is similarly unavailing. The most that can be said about *Direct Sales* in this context is that it requires proof of a conspiracy to be "clear, not equivocal," and forbids "piling inference upon inference" to establish the elements of the crime. 319 U.S. at 711. Nothing in *Direct Sales* addresses the use of circumstantial evidence generally or the persuasive force of the evidence introduced in this case. Indeed, in *Direct Sales* itself, this Court upheld a drug company's conspiracy conviction on the basis of circumstantial evidence, namely that the company sold morphine sulphate to its co-conspirator, a doctor, "in such quantities, so frequently and over so long a period it must have known he could not dispense the amounts received in lawful practice and was therefore distributing the drug illegally." 319 U.S. at 705.

[4] Mr. Fletcher later testified that the conspirators had discussed using foreign corporations and trusts, but, as the court of appeals noted, "he testified that he did not have a trust account or own a corporation in the Bahamas." Pet. App. 33.

Petitioners do not attempt to rebut the analysis of the court of appeals, but instead argue (Pet. 39-41) that petitioners' understanding of the tax laws was probative of their intent to violate those laws. This proposition is of course true in the abstract, but for the reasons stated by the court of appeals it has nothing to do with this case. In the absence of any reason to believe that this case involved foreign trusts or foreign corporations, petitioners' views regarding the tax treatment of such entities are irrelevant. The district court therefore properly excluded the proffered evidence regarding those matters.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
KAREN QUESNEL
Attorneys

JULY 1991

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[5] There is no substance to petitioners' claim (Pet. 43-44) that the decision below conflicts with the decision of the Fifth Circuit in *United States* v. *Burton*, 737 F.2d 439 (1984). Nothing in *Burton* requires a court to admit irrelevant evidence. Indeed, in *Burton*, the Fifth Circuit expressly noted that "a trial judge's analysis of admissibility * * * begins with the decision that proffered evidence is relevant." *Id.* at 443.

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